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IN THE

Supreme Court of the United States

October Term, 1970.

No. 443.

BUCKS COUNTY CABLE, TV, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ROBERT T. BARTLEY, ET AL.,

and

U. S. COMMUNICATIONS CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner prays that a writ of certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Third Circuit, entered in the above-entitled cases on June 4, 1970.

CITATIONS TO OPINIONS BELOW.

The Memorandum Opinion and Order of the Federal Communications Commission (FCC) adopted on January 22, 1969 is reported in 15 F. C. C. 2d 902 and is printed in the Appendix hereto at p. 1a. The Opinion and Order of the District Court is reported in 299 F. Supp. 1325 (E. D. Pa. 1969) and is printed in the Appendix hereto at p. 7a. The Order of the District Court denying the government's Motion for Rehearing and Motion to Vacate Injunction is unreported and is printed in the Appendix hereto at p. 33a. The Opinion of the Court of Appeals is not yet reported in the Federal Reporter, but is printed in the Appendix hereto at p. 35a.

JURISDICTION.

The Judgment and Order of the Court of Appeals were entered on June 4, 1970 and are printed in the Appendix hereto at pp. 50a-51a. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Is a regulation of a Federal administrative agency valid which restrains for an indefinite period of time the operation of a lawful business simply upon the filing by a private competitor of a petition which is neither ruled upon nor even reviewed by any judicial or administrative officer?

REGULATIONS INVOLVED.

Rule 74.1105(c) of the Federal Communications Commission, 32 F. R. 915, 1090, 10306, Title 47 C. F. R., Chapter I, Subpart K, § 74.1105(c), provides in pertinent part:

> "(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures;"

Rule 74.1109(a) of the Federal Communications Commission, 31 F. R. 4570, 6315, Title 47 C. F. R., Chapter I, Subpart K, § 74.1109(a) provides in pertinent part:

> "(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question."

STATEMENT.

Bucks County Cable owns and operates a community antenna television system (CATV system) in Falls Township, Bucks County, Pennsylvania. A CATV system consists of a master antenna which receives television signals off the air, equipment which amplifies the signals, and many miles of cables which carry the signals to the homes of subscribers who pay a monthly fee for the service.

The Rules of the Federal Communications Commission prohibit the carriage by a CATV system of "distant signals", unless permitted by the FCC upon petition of the CATV system and after hearing. 47 C. F. R. § 74.1107. Roughly speaking, a television signal is "distant" if it does not reach the community involved with at least Grade B intensity. No statute, rule or regulation prohibits carriage into a community of any television signal which is not "distant".

Falls Township is located directly across the Delaware River from Trenton, New Jersey, about 25 miles from center city Philadelphia, and is a community of about 7,300 homes. Bucks County Cable proposed to carry to its Falls Township customers all seven of the Philadelphia-based television stations, the Wilmington educational television station, and the four New York independent television stations. Since Falls Township is within the "Grade B contour" of *all* such stations, *including the four New York independent stations*, carriage of those stations by Bucks County Cable was *not* prohibited by any law or regulation.

On May 17, 1968, in accordance with FCC Rule 74.1105(a), Bucks County Cable gave written notice of the stations which it proposed to carry on its Falls Township system. On June 17, 1968, two commercial UHF stations, competitors of Bucks County Cable, filed a Petition under FCC Rule 74.1109(a) objecting to the carriage of the four

New York independent stations. The petition did not contend that the Rules prohibit Bucks County Cable's carriage of the New York Stations. On the contrary, the petition asked for a "waiver of the rules" on the ground that the listening audiences of the UHF stations would be unduly diminished if they had to compete in Falls Township with the New York stations.

The FCC neither ruled on, nor even reviewed, the merits of the Petition for Waiver of the Rules. Nevertheless, upon the mere filing of the Petition, Bucks County Cable's proposed CATV service was automatically stayed and restrained under Rule 74.1105(c), "until after the Commission's ruling on the Petition or on the interlocutory question of temporary relief pending further procedures."

On August 6, 1968, the pleadings were closed and the FCC became obligated under its own Rule 74.1109(f) to "expedite its consideration and promptly issue a ruling . . ."[1] However, the FCC took no action whatsoever during August, September and October, 1968. Finally on October 23, 1968, Bucks County Cable petitioned for tem-

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1. The FCC's "prompt" ruling could have been an outright denial of the petition for waiver of the rules on the ground that the UHF stations had not shown "reasons why the public interest would be served by individualized waiver of the rules". *Titusville Cable TV, Inc. v. United States*, 404 F. 2d 1187, 1192 (3 Cir. 1968); *Interstate Broadcasting Co. v. FCC*, 323 F. 2d 797, 801 (D. C. Cir. 1963). On the other hand, if the *allegations* of the petition were deemed sufficient, the FCC was obliged to order a full evidentiary hearing to determine whether the allegations could be *proven*. *Second Report and Order*, 2 F. C. C. 2d 765, paras. 138-151 (1966); See generally *Midwest Television, Inc.*, 4 FCC 2d 612 (1966).

At such an evidentiary hearing, the UHF stations would have had the heavy burden of proving "the effects of current and proposed CATV service in the [Philadelphia] area upon existing, proposed and potential television broadcast stations in the market". See *Ultravision Broadcasting Co.*, 5 F. C. C. 2d 217, 218 (1966); *Midwest Television, Inc.*, 4 F. C. C. 2d 612, 625-26 (1966); *Taft Broadcasting Co.*, 5 F. C. C. 2d 746, 747 (1966); *Vumore Video Corp.*, 12 F. C. C. 2d 955, 959 (1968); *Cedar Rapids Television Co. v. FCC*, 387 F. 2d 228 (D. C. Cir. 1967).

porary relief, requesting either the prompt determination to which Bucks County Cable was entitled, or permission to commence service pending a determination. Nevertheless, through October, November, and December, 1968, the FCC took no action whatsoever.

On December 13, 1968, the FCC issued to the public a "Notice of Proposed Rulemaking and Notice of Inquiry", 15 F. C. C. 2d 417 (1968). The Notice proposed rules which would, for the first time, *prohibit* Bucks County Cable's carriage of the four New York independent stations, and at the same time *cancelled* all hearings under existing rules on automatically stayed CATV service. Although the Notice also provided that all CATV systems lawfully operating prior to December 20, 1968, would be "grandfathered" under the old Rules and exempted from the new prohibitory rules, Bucks County Cable was purportedly disabled by the automatic stay from "lawfully operating" and taking advantage of the grandfathering provision, simply because of the pendency of the still unreviewed petitions previously filed by its UHF competitors.

On December 19, 1968, in order to challenge the constitutionality of the automatic stay and come within the "grandfathering" provision of the December 13, 1968 Notice, Bucks County Cable commenced carriage of the four New York independent stations. Bucks County Cable then brought an action in the United States District Court for the Eastern District of Pennsylvania requesting a declaratory judgment that the automatic stay was invalid, and for a preliminary injunction against any prosecution under Section 502 of the Communications Act, 47 U. S. C. § 502. The bases of jurisdiction in the District Court were Section 10 of the Administrative Procedure Act, 5 U. S. C. §§ 702-04 and Sections 1331 and 1337 of the Judicial Code, 28 U. S. C. §§ 1331, 1337.

On January 22, 1969, while the District Court's decision was under advisement, and a month after the grandfathering date had passed, the FCC issued a "Memorandum Opinion and Order" in which it denied Bucks County Cable's Petition for Temporary Relief, and purported to order a hearing on the Petition for Waiver of the Rules. However, the Order also provided that no such hearing would take place pending the adoption of new rules intended to supplant the hearing process, and as of this date no such hearing has been held. FCC Commissioner Bartley dissented, characterizing the Memorandum as "sham" because it purported to order a hearing which the FCC already had cancelled.

On February 10, 1969, Bucks County Cable filed "protective" Petitions for Review in the United States Court of Appeals for the Third Circuit raising precisely the same issues which were pending before the District Court. Jurisdiction was based on Section 402(a) of the Communications Act, 47 U. S. C. 402(a) and the Hobbs Act, 28 U. S. C. § 2342.

On March 28, 1969, the District Court declared that Rule 74.1105(c) was invalid as applied in the circumstances, and enjoined the Government from prosecuting Bucks County Cable for continuing to carry the four New York independent stations. On April 17, 1969, the District Court denied the Government's Motion for Rehearing and Motion to Vacate Injunction.

On June 12, 1969, the Government appealed the District Court's action to the United States Court of Appeals for the Third Circuit, and the Petitions for Review and the Appeal were consolidated for briefing and argument.

On June 4, 1979, after oral argument, the Court of Appeals denied the Petitions for Review and reversed the Judgment of the District Court. This Petition seeks a writ of certiorari to review that Order and Judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT.

I. The Automatic Stay Provision Is a Fundamentally Unfair and Unprecedented Departure From the Accepted and Usual Course of Administrative Procedure.

A regulation of a Federal Administrative Agency which provides for the restraint of a lawful business automatically, simply upon the filing by a private competitor of a petition containing ex parte allegations which are neither ruled upon nor even considered by any judicial or administrative officer, is so far a departure from the accepted and usual course of judicial and administrative procedure that review by this Court on certiorari should be granted.

Historically, Congress has exercised the utmost care and selectivity in dispensing injunctive or cease and desist powers to Federal administrative agencies. In *every* case, such statutory authority is conditioned upon either a prior hearing, a prior application to the Court, or at least a prior administrative finding of fact.[2] For example, the only spe-

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2. A survey of seventeen Federal departments and regulatory agencies demonstrates the care, precision and extreme caution with which Congress has made injunctive powers available. Of course, no agency has the power to enjoin a business automatically upon the mere filing of an ex parte petition which is neither ruled upon nor even considered. See: *Atomic Energy Act of 1954*, § 232, 42 U. S. C. § 2280; *Federal Aviation Act of 1958*, § 411, 49 U. S. C. § 1381; *Civil Rights Act of 1960*, § 601(b), as amended, 42 U. S. C. § 1971 (c); *Packers and Stockyards Act of 1921*, §§ 8, 203, 204, 7 U. S. C. §§ 193, 194; *Federal Seed Act*, §§ 409, 410, 7 U. S. C. §§ 1599, 1600; *Financial Institutions Supervisory Act of 1966*, §§ 101(a), 102(a), 202, 204, 12 U. S. C. §§ 1464(d), 1730, 1818; *Act of June 13, 1933*, Chap. 64, § 5, 48 Stat. 132 (the predecessor of Section 101(a) of the *Financial Institutions Supervisory Act of 1966*); *The Shipping Act of 1916*, §§ 17, 23, 46 U. S. C. §§ 846, 822; *Public Utility Act of 1935*, § 314, 16 U. S. C. § 825m; *Public Utility Holding Company Act of 1935*, § 18, 15 U. S. C. 79r(f); *Sherman Anti-Trust Act of 1914*, § 11, 15 U. S. C. § 21(b), (c); *Federal Trade Commission Act*, § 5, 15 U. S. C. § 45(b), (c); *Federal Trade Commission Act*, § 13, 15 U. S. C. § 53; *Wool Products Labeling Act of 1939*, § 7, 15 U. S. C. § 68e(b); *Fur Products Labeling Act*, § 9, 15 U. S. C. § 69g(b);

cific "injunctive" power granted by Congress to the FCC is the power to issue cease and desist orders under Section 312 of the Communications Act, 47 U. S. C. § 312. Section 312 specifically conditions the FCC's power to issue such orders on the prior issuance of a show-cause order *and a prior hearing.*

The most substantial departure from the uniform Congressional insistence on hearings or court applications prior to the issuance of injunctions, is contained in the recently enacted *Financial Institutions Supervisory Act of 1966*, § 101(a), 12 U. S. C. § 1464(d) (Supp. II, 1965-66) which specifically authorizes the Federal Home Loan Bank Board to issue a temporary injunctive order, without a hearing, pending evidentiary hearings. However, even the emergency injunction authorized by this section may issue only after the "Board determines violation is likely to cause insolvency or substantial dissipation of assets . . . ." 12 U. S. C. § 1464(d). *No Federal administrative agency has ever been authorized to issue a stay or temporary restraint automatically without any prior finding or consideration by the agency.*

Indeed, *not even a Court* can issue a stay or temporary restraint *automatically*. A judge may only issue a temporary restraint after review of the facts alleged, and the

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2. (Cont'd)

Textile Fibre Products Identification Act, § 8, 15 U. S. C. 70f; *Flammable Fabrics Act*, § 6, 15 U. S. C. 1194(a); *Department of Health, Education and Welfare Act*, 21 U. S. C. §§ 332, 334, 344, 381; *Interstate Commerce Act*, § 5, 49 U. S. C. §§ 5(7), 5(8), 16(12), 1011(d), 1017(b); *Labor-Management Relations Act of 1947*, § 101, 29 U. S. C. § 160(j); *Norris-LaGuardia Act*, § 7, 29 U. S. C. § 107-10; *Fair Labor Standards Act of 1938*, § 17, as amended, 29 U. S. C. § 217; *Investment Company Act of 1940*, § 80a-35; *Securities Act of 1933*, § 20, 15 U. S. C. § 77t; *Securities Exchange Act of 1934*, § 21, 15 U. S. C. § 78u(e); *Investment Advisors Act of 1940*, § 209, 15 U. S. C. § 80b-9(e); *Small Business Investment Act of 1958*, § 4, as amended, 15 U. S. C. § 687a(b)-(c); *Tennessee Valley Authority Act of 1933*, § 26(a), 16 U. S. C. § 831y-1.

exercise of independent judgment. For example, under Rule 65(b), F. R. C. P., a temporary restraining order may issue *only* if a Federal Judge *recites* the sworn allegations of the complaint and expressly *finds* that "immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition."

In contrast, under Rule 74.1105(c), a CATV operator is restrained by the mere filing of a paper by a private opponent. No findings need be made. Indeed, that paper is not even read by anyone to determine whether the allegations have any merit or substance whatsoever. Thus, Section 74.1105(c) delegates to the sole discretion of private parties the Government's power to enjoin other private parties.

In the only case which has been found where a similar provision has been reviewed by an appellate court, an automatic stay provision was emphatically disapproved. *Mongogna v. O'Dwyer*, 204 La. 1030, 16 So. 2d 829, 152 A. L. R. 168 (1943).

Recent decisions of this Court have further strengthened the prohibition against the issuance of ex parte orders which affect life, liberty or property *unless some impartial Governmental authority intervenes and exercises discretion and judgment.* Thus, search warrants, arrest warrants and even orders permitting building inspections cannot issue without the intervention and exercise of independent judgment by an impartial judicial officer. See *Camara v. Municipal Court*, 387 U. S. 23 (1967); *See v. Seattle*, 387 U. S. 541 (1967).

In the present case, the FCC has acted as a "rubber stamp" enjoining Bucks County Cable from carrying on its business merely because two private parties filed some papers. During the entire period at issue here, for all the Commissioners knew, those papers could have contained

nursery rhymes. A stay or restraining order issued under such circumstances is clearly invalid.

In upholding the automatic stay provision, the Court of Appeals does not cite any case or other authority. The crux of its Opinion on this point is reflected in the following language (41a-42a):

> "The FCC determined that a procedure was necessary by which it could review proposed CATV service before that service became entrenched. Rather than prohibit all CATV operations pending consideration, the FCC allowed those operations not involving the extension of signals beyond their Grade B contours to proceed unmolested unless there was an objection, but where important issues of impact on broadcast services were raised by objection or otherwise, the FCC required that such isues be considered before the CATV system commenced operations."

The court's reasoning obviously does not meet Bucks County Cable's contentions. Granting that "a procedure was necessary by which it could review proposed CATV service before that service became entrenched", such a procedure could be consistent with due process only if it involved a restraint imposed *after* some review of the nature and merits of the objections interposed. Similarly, the FCC undoubtedly has the power to permit CATV operations "unless there was an objection", but the objection must be one that is reviewed and evaluated by some impartial judicial or administrative officer. Finally, it is admitted that the FCC may require "important issues of impact on broadcast services" to be determined "before the CATV system commenced operations", but the vice of the "automatic stay" provision is that the stay operates *regardless* of what issues are raised, and *regardless* of

whether they are important, merely because some "interested party" files some sort of paper objecting to the proposed service.

In other words, the Court of Appeals' Opinion ignores the fact that although a stay to preserve the status quo may be necessary, there is no reason why an *automatic* stay is necessary. On the contrary, there is every reason why the FCC should be required to have some appropriate official promptly review the submissions of the parties, and either grant or deny the stay, pending further procedures.

Since all Federal and State Judges must make a factual determination before issuing temporary restraining orders, the Court of Appeals was compelled to attempt a distinction between the automatic stay and a temporary restraining order (42a-43a):

> The limitations on temporary restraining orders reflect the fact that they are normally sought in situations where one has already begun operation after substantial investment under a prima facie right. In contrast, the FCC's automatic stay is not applied where legal operation has commenced and does not prevent the exercise of any presumptive right. It is designed to facilitate a prior determination whether a proposed operation should be sanctioned in the public interest where objectors raise that question. Furthermore, the regulations contemplate that the stay will be applied before substantial investments have been made. Although Bucks did invest money before the stay went into effect here, as noted below Bucks could easily have avoided this result by disclosing its intentions at an earlier date before any investment was made.

The distinction is patently untenable. First, the limitations upon the issuance of temporary restraining orders

have nothing to do with whether a "substantial investment" has been made by the party sought to be restrained. A federal judge cannot grant such an order unless the *applicant* shows to the judge's impartial satisfaction that "immediate and irreparable injury" will result to the *applicant*. There can be no doubt that an "automatic" temporary restraining order would be summarily overturned whether the activity restrained involved an existing investment, or the making of an entirely new investment.

Second, the automatic stay is *not* premised on some "prior determination whether a proposed operation should be sanctioned in the public interest where objectors raise that question." The fact is that the automatic stay operates *regardless of what question* is raised by an objecting party; the rule contains no limitation whatsoever on *what* questions must be raised, nor does it provide that *any* questions be raised. The only requirement is that the piece of paper which is filed contain some undefined "challenge" to "new service". Rule 74.1105(c).

Third, even if the automatic stay operated only if certain pre-defined public interest questions were raised, which it does not, it still would be necessary for some independent judicial or administrative officer to make a prior review of the petition to determine whether such questions were *in fact* adequately raised.

Finally, the Court seems to attach significance to the fact that Bucks County Cable could have given, but was not required to give notice of its proposed service before it invested $500,000.00 in its Falls Township system. This begs the question. If the automatic stay violates Bucks County Cable's constitutional rights, it may not be upheld on the ground that Bucks County Cable could have precipitated such violation before it spent any money.

II. The Decision Upholding the Automatic Stay Is a Distortion and Unwarranted Extension of United States v. Southwestern Cable Co.

United States v. Southwestern Cable Co., 392 U. S. 157 (1968) (Harlan, J.) involved a factual situation substantially identical to the present case. A CATV system gave notice that it proposed to carry Los Angeles television signals in the San Diego area. A television station filed a petition for waiver of the rules. A series of responsive pleadings was then filed by each side. *After reviewing all of the papers filed*, the FCC ordered that the CATV system stay its carriage of Los Angeles signals pending hearings. On appeal, this Court upheld the stay order, but not before noting that it was issued by the FCC "after examination of various responsive pleadings . . ." (392 U. S. at 179).

Of course, the stay upheld by this Court in *Southwestern Cable* was the very opposite of the stay about which Bucks County Cable complains in the present case. The *Southwestern Cable* stay was *not* imposed automatically merely because a private competitor filed a paper. Indeed, in *Southwestern Cable*, the FCC issued a lengthy opinion supporting the issuance of the temporary stay. *Midwest Television, Inc.*, 4 F. C. C. 2d 612 (1966).

Nor was the distinction between a rubber stamp stay and a properly issued stay lost on the government when it argued *Southwestern Cable* to this Court. Faced in *Southwestern Cable* with a heavy attack on the FCC's power to issue *any* kind of temporary stay without a hearing, the government *then* made the following argument in its *Reply Brief for the United States and the Federal Communications Commission*, p. 17:

> "Moreover, the interim stay order was issued only after elaborate submissions by the parties and upon a considered Commission determination that, in view

> of these submissions, a halt to CATV expansion in San Diego was at least temporarily required, in order to allow the Commission an adequate opportunity to investigate the matter further. It is difficult to conceive that a Court would not issue temporary injunctive relief in similar circumstances."

In the present case, Bucks County Cable complains about the absence of the very procedure which was urged by the Government as justification for the issuance of the stay order in *Southwestern Cable*. Here there was no "considered Commission determination" before the stay issued. Nor were there any "formalities" sufficient to support the issuance of a temporary restraining order.

Nevertheless, having sustained in *Southwestern Cable* its power to issue a stay *after a review of the pleadings*, the FCC now attempts to arrogate to itself the power to impose a stay *automatically*. No Federal or State court has such power. Nor does any other administrative agency. The *Southwestern Cable* case must not be extended to carve out an exception for the FCC.

There is another fundamental inconsistency between *Southwestern Cable* and the present case. The automatic stay purports to be "temporary" and for the purpose of "preserving the status quo". *However, on December 13, 1968*, the FCC cancelled the pending hearings. As a result, Bucks County Cable has remained "stayed" without a hearing since June 17, 1968, *more than two years*.

It is, of course, a basic tenet of due process that a temporary stay granted without a hearing is valid only to preserve the status quo *pending a prompt hearing*. Thus, in every case in which a temporary stay granted by an administrative agency has been upheld, the court emphasized that the stay was effective only *pending appropriate hearings*. See *e.g.*, *R. A. Holman & Co. v. SEC*, 299 F. 2d 127

(D. C. Cir. 1962); *Public Service Commission v. FPC*, 327 F. 2d 392 (D. C. Cir. 1964).

Accordingly, in *Southwestern Cable*, the government represented to this court no less than *eight* times that the stay was only a temporary one, pending full evidentiary hearings which would be held by the FCC.[3] Accepting these representations, this Court noted that the stay was only in force "pending appropriate hearings": 392 U. S. at 179 and 181. Only on that basis did this Court uphold the stay, noting that there was "no claim that [the FCC's] procedure in this respect is in any way constitutionally infirm". 392 U. S. at 181.

By contrast, in the present case, the purported hearing has been "halted" and has not been held despite the passage of more than two years. Thus, the stay in this case, unlike the stay as represented in *Southwestern Cable*, is most definitely "constitutionally infirm".[4]

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3. *Brief for the United States and the Federal Communications Commission*, pp. 12, 15-16, 17-18, 19, 20-21, 26, 27; *Reply Brief for the United States and the Federal Communications Commission*, pp. 11-12.

The petitioner in the *Southwestern* case was represented by the same counsel who represents the Intervenor in the present case. His Briefs also represented to the Supreme Court that the stay was a temporary one pending hearings. For example, the argument heading on Page 38 of the *Brief for Petitioners* is "The Commission's Authority to Regulate CATV Systems Encompasses a Temporary Stay of their Expansion Pending a Plenary Hearing to Determine Whether It Would Serve the Public Interest". On Page 41 of the same Brief, it is stated "*a halt in CATV expansion during the course of a hearing is no less 'necessary' than the hearing itself*". (Emphasis supplied)

4. On January 22, 1969, a month after the grandfathering date and the commencement of the action in the District Court, the FCC finally issued an order based upon a review of the pleadings. Both the Court of Appeals and the District Court disregarded this belated action in reaching their decisions. In fact, the January 22 Order does not bear on the issue of the validity of the stay automatically imposed under Rule 74.1105(c).

First, the January 22, 1969 Order did *not* stay Bucks County Cable's carriage of the New York stations. On the contrary, the

4. (Cont'd)

order merely recites the FCC's refusal to lift the existing automatic stay under Rule 74.1105(c). (App. 2a, fn. 1). Thus, if Rule 74.1105(c) is invalid, Bucks County Cable's carriage of New York signals is not stayed.

Second, even if the January 22, 1969 Order is construed as a stay, it was obviously premised on the legal validity of the automatic stay. Having proposed that CATV systems lawfully operating prior to December 20, 1968 should be grandfathered, the FCC would have no basis for staying Bucks County Cable if it is determined that its operations prior to December 20, 1968 were in fact lawful.

Third, the January 22 Order, even if it was a stay, suffers from at least one of the same fatal infirmities of the automatic stay. It is a stay to preserve the status quo, but the pending appropriate hearings necessary to its validity have been "halted" and indeed cancelled.

Finally, and most importantly, the FCC provided in its December 13, 1968 Notice that any CATV carriage not in violation of its existing rules, would be grandfathered if commenced prior to December 20, 1968. Bucks County Cable's carriage of the New York signals on December 19, 1968 was clearly within all the FCC's then existing rules, except 74.1105(c), the automatic stay provision. Thus, if the automatic stay provision was invalid from the outset, Bucks County Cable's service was "grandfathered" under the FCC's own procedures, and the January 22, 1969 Memorandum Opinion and Order is besides the point.

The Intervenor argued in the Court of Appeals that Bucks County Cable would not be grandfathered because the grandfathering provision is only a "proposed" rule. This is in error.

While it is true that the "grandfathering" provision is a "proposed" rule, under the interim procedures promulgated by the FCC, a CATV system may operate if its service is "entirely consistent with the proposed rules." (R. 187). Thus, it is a proposed rule which is in effect at the present time. Unlike the Intervenor, the Government does not dispute the fact that Bucks County Cable is grandfathered if the automatic stay was invalid on December 19 and 20, 1968. See *Brief for Appellants* in No. 18,037, pp. 14-15 and *Brief for Respondents* in Nos. 17,743-745, pp. 13 and 34.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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LOUIS J. GOFFMAN,
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Of Counsel:
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12th Floor, Packard Building
Philadelphia, Pa. 19102

Date: July 24, 1970

APPENDIX.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

FCC 69-78

25624

Docket No. 18140 et al.

File No. CATV 100-18 et al.

Docket No. 18432

File No. SR-106811

IN RE PETITIONS BY

DELAWARE COUNTY CABLE TELEVISION COMPANY ET AL.

BUCKS COUNTY CABLE TV, INC.

FAIRLESS HILLS, PENNSYLVANIA

REQUEST FOR SPECIAL RELIEF FILED PURSUANT TO SECTION 74.1109 OF THE COMMISSION'S RULES.

MEMORANDUM OPINION AND ORDER.

Adopted: January 22, 1969 Released: January 23, 1969

By the Commission: Commissioner Bartley concurring in part and dissenting in part and issuing a statement; Commissioners Wadsworth and H. Rex Lee absent.

1. On May 17, 1968, Bucks County Cable TV, Inc., gave notification pursuant to Section 74.1105 of the Commission's Rules of its intention to commence CATV operation in Falls Township, Bucks County, Pennsylvania. On June 18, 1968, WIBF Broadcasting Company, permittee of Station

WIBF-TV, Philadelphia, Pennsylvania, and U. S. Communications of Philadelphia, Inc., licensee of Station WPHL-TV, Philadelphia, Pennsylvania filed a petition requesting temporary and permanent relief pursuant to Section 74.1109 of the Rules against carriage of New York signals by Bucks County on its CATV system in Falls Township. This petition is opposed by Bucks County, and WIBF Broadcasting and U. S. Communications have replied.[1]

2. Bucks County proposes to commence operations in Falls Township carrying the following local signals: KYW-TV, WFIL-TV, WCAU-TV, WIBF-TV, WPHL-TV, WUHY-TV, WKBS-TV, Philadelphia, Pennsylvania; WHYY-TV, Wilmington, Delaware, and WNEW-TV, WOR-TV, WPIX, WNDT, New York, New York. WIBF Broadcasting and U. S. Communications urge that the rationale of footnote 69 of the *Second Report and Order* requires that the New York signals not be carried on Bucks County's system pending hearing.

3. In the *Second Report and Order*, the Commission determined that CATV systems should generally carry the signals of all local television stations, that is those providing predicted Grade B contours over the systems. See also, Shen-Heights TV Association, FCC 68-168, 11 FCC 2d 814. Footnote 69 recognizes that there may be special circumstances that would justify an exception to this rule when there is predicted Grade B overlap between two major markets.

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1. On October 23, 1968, Bucks County filed a petition requesting the Commisssion to permit Bucks County to commence its CATV service with the carriage of stations set out in its notice dated May 17, 1968, pending consideration of the above mentioned petitions. This petition which in effect asks for a waiver of the "mandatory stay" provision of Section 74.1105(a) of the Rules is denied because Bucks County has made no showing to justify the extraordinary relief requested.

4. New York is the first major market and Philadelphia is the fourth, according to the 1968 ARB ranking. The carriage of New York signals in the Philadelphia market may interfere with the development of the independent UHF stations in the area. Accordingly, consistent with the rationale of footnote 69, we will explore the question in hearing. Bucks County may operate in the interim carrying the Philadelphia and Wilmington signals.

Accordingly, A HEARING IS ORDERED to be consolidated with the hearing in Docket No. 18140-18166 at a time and place to be specified in a further order, upon the following issues:

1. To determine the present and proposed penetration and extent of CATV service in the Philadelphia television market.
2. To determine the effects of current and proposed CATV service in the Philadelphia market upon existing, proposed and potential television broadcast stations in the market.
3. To determine (a) the present policy and proposed future plans of petitioners with respect to the furnishing of any service other than the relay of the signals of broadcasting stations; (b) the potential for such services; and (c) the impact of such services upon television broadcast stations in the market.
4. To determine whether carriage of predicted Grade B or better signals from New York City stations should be authorized.
5. To determine whether the applications and proposals are consistent with the public interest.

Bucks County Cable TV, Inc., WIBF Broadcasting Company, and U. S. Communications of Philadelphia, Inc., are made parties to the proceeding and to participate must

comply with the applicable provisions of Section 1.221 of the Commission's Rules.

IT IS FURTHER ORDERED, That respondent, Bucks County Cable TV, Inc., has the burden of proceeding and the burden of proof with respect to Issue 1, Issue 2, and Issue 3 insofar as it relates to its own CATV system, and that petitioners have the burden of proceeding and the burden of proof with respect to Issue 4. Issue 5 is conclusory.

Accordingly, petition of WIBF Broadcasting Company and U. S. Communications of Philadelphia, Inc. IS GRANTED to the extent indicated above and is otherwise DENIED.

We note that Bucks County has filed a Complaint and Motion for Preliminary Injunction against the United States and the Federal Communications Commission in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 68-2773. In view of the pendency of that proceeding (in connection with which a Motion to Dismiss for lack of jurisdiction has been filed by the Commission), we take this action further to make clear our position. We stress the requirement that Bucks County must comply with our rules and policies and emphasize that we intend to take all appropriate steps to bring about such compliance. We also point out that while the matter of the objections to Bucks County's carriage of the New York signals is placed in hearing, the course of such hearing will, of course, be determined by our Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, released December 13, 1968 (see paragraph 51).

FEDERAL COMMUNICATIONS COMMISSION *

BEN F. WAPLE,
Secretary.

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* See attached statement of Commissioner Bartley concurring in part and dissenting in part.

Statement of Commissioner Robert T. Bartley Concurring in Part and Dissenting in Part.

I concur in authorizing Bucks County to carry the "local" signals of Philadelphia and Wilmington stations.

I dissent to the order for a hearing on carriage of signals from New York City stations. The order is meaningless, in view of the Commission's action of December 12, 1968, Docket No. 18397, "Notice of Proposed Rule Making and Notice of Inquiry," which froze all such hearings. Therein, the Commission stated:

> *"Interim Procedures*
>
> 51. We turn now to the procedure to be followed by the Commission while this rulemaking is pending. Effective upon the issuance of this Notice, the Commission will halt the hearing process in all top 100 market proceedings (including those with a 'footnote 69' issue) wherever it stands, even at the Review Board or Commission level.[23] There is no point in requiring the parties and the Commission to expend the resources and effort necessary to continue such hearings if the definitive policy is to supplant that process. We will also stop processing petitions for waiver of the hearing requirement.
> * * *
>
> 52. CATV systems now carrying Grade B signals from a major market within the Grade B contour of a station in another major market, or those proposing to do so, are not proscribed by the existing rules except where the filing of a timely Section 74.1109 petition continues the operative effect of Section

"23. We will, however, consider the appropriateness of resolving issues in hearings which do not involve the question of impact upon broadcasting stations."

74.1105(c).. Commission action on pending and future Section 74.1109 petitions of this nature will be held in abeyance pending the outcome of this proceeding. * * *"

I believe that the "Interim Procedures" are invalid (for the reasons given in my dissent thereto), but since the Commission has implemented the procedures; it is a sham here to order a hearing which cannot take place because of those procedures.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 68-2773

BUCKS COUNTY CABLE TV, INC.

v.

THE UNITED STATES OF AMERICA

and

THE FEDERAL COMMUNICATIONS COMMISSION

and

ROBERT T. BARTLEY, KENNETH A. COX, ROSEL H. HYDE, NICHOLAS JOHNSON, H. REX LEE, ROBERT E. LEE, JAMES J. WADSWORTH

OPINION AND ORDER.

BODY, *J.* MARCH 28, 1969

The plaintiff, Bucks County Cable TV, Inc., seeks a declaratory judgment and preliminary injunction against the defendants, the Federal Communications Commission and individual Federal Communications Commissioners. The plaintiff contends that the Commission unduly delayed rendering a decision as to whether plaintiff could transmit certain New York signals, causing great harm to plaintiff's operations and financial investment. In addition, the plaintiff contends that its commencement of service in defiance

of Commission Rule 74.1105(c)[1] should not be subject to prosecution under 47 U. S. C. § 502[2] because the rule is unconstitutional as applied to it as a result of the Commission's delay in hearing their case.

The Commission, on the other hand, argues that this Court does not have jurisdiction, and even if it did, the plaintiff is without "clean hands" in seeking equitable relief. In addition, the Commission argues that no undue delay exists in disposing of plaintiff's case before the Commission.

I. FACTS.

Plaintiff was organized to establish and operate a community antenna television system in various Bucks County communities. During 1965 the governing bodies of Warminster, Bensalem, Warrington, Lower Southampton and Falls Townships in Bucks County passed ordinances granting plaintiff franchises to establish and operate CATV sys-

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1. "Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however*, That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107."

2. "Any person who wilfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

tems in each of the townships. The Falls Township ordinance was enacted on December 2, 1965. Plaintiff's plan was to carry all of the Philadelphia VHF and UHF stations and the four New York independent stations. (KYW-TV, WFIL-TV, WCAU-TV, WIBF-TV, WPHL-TV, WUHY-TV, WKBS-TV, Philadelphia; WHYY-TV, Wilmington; and WNEW-TV, WOR-TV, WPIX, WNDT, New York).

On February 18, 1966 the Broadway Maintenance Corporation acquired Bucks County Cable TV, Inc. (Broadway Maintenance Corporation has been substituted as plaintiff in this action.) When Bucks County Cable TV, Inc. was purchased it had spent approximately $32,000 on the five antenna system franchises.

On March 8, 1966, to be effective on March 17, 1966, the Federal Communications Commission issued its Second Report and Order, 2 FCC 2d 725 (1966) and promulgated rules intended to regulate CATV systems for the first time. (47 CFR, Subpart K, Sections 74.1100 through 74.1109.) Section 74.1107(a)[3] restricted the carriage by CATV systems of so-called "distant signals" into homes in the one hundred largest television markets. In essence, the rule means that unless a television broadcasting station transmits a signal of at least Grade B in quality into one of the one hundred largest television markets, a CATV system operating within that market is prohibited from supplying that particular television station to its subscribers.

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3. "No CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approving by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after considertaion of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made . . ."

New York is the largest or number one television market in the country. Philadelphia is fourth. This rule meant that plaintiff could carry New York signals in Bucks County communities so long as the area served fell within the Grade B contour of the particular New York station being retransmitted. An exception might be made, however, under footnote 69[4] of the Second Report which covers situations like plaintiff's, where the community antenna system proposed to serve an area included within the Grade B contours of two major areas, viz, New York (1) and Philadelphia (4).

The rules further provided for notification prior to the commencement of new service. Notice goes to all television stations with Grade B signals in the community of the system. Section 74.1105(a) in addition provides that such notice by the new system shall be given:

> "... within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given ..."

Section 74.1109 provides for procedures to be followed when a waiver of rules is sought, such as footnote 69 situation. This same section provides:

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4. "If the major markets each fall within one another's grade B contour (e.g. Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the usual case where a problem of this nature might arise." 2 FCC 2d 725, 786 (1966).

> "Where a petition involves new service to subscribers (other than service coming within the provisions of 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling whether on the merits of the petition or on the interlocutory question of temporary relief pending further procedures."

Section 74.1105(c) provides for an "automatic stay" on new service where another station applies for a waiver of the rules (as in the case of a footnote 69 situation):

> "Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice; new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures . . ."

The plaintiff engaged the services of the George P. Adair Engineering Company, specialists in the field, to conduct a survey and prepare a report showing the Grade B contours of the New York stations. On August 26, 1966 Adair reported that although some of the five communities were within the Grade B contours of some of the New York television stations, only Falls Township was within the Grade B contour of all of the independent New York television stations. Since plaintiff had determined that it must carry the New York stations to be profitable, it decided to construct and market a CATV system in Falls Township only.

From September 1966 through June 17, 1968 the plaintiff started building its system. It laid most of its main trunk cable and a large part of its distribution cables, bought electronic equipment, hired permanent staff, and

made certain long-term leases and agreements. By June 17, 1968 plaintiff's investments were in excess of $500,000.

On May 17, 1968, plaintiff gave notice of new service to area television stations required by Section 74.1105(a). On June 17, 1968 two Philadelphia UHF stations, Channels 17 and 29, filed a petition for waiver of the Rules with the Commisison under Section 74.1109(a). The petition admitted that Falls Township was within the Grade B contours of the New York television stations but requested the Commisison to prohibit plaintiff's proposed service on the ground that it would adversely affect the ability of their UHF stations to maintain a usable and high quality local service. (This is the kind of exception mentioned in footnote 69 of the Second Report, 2 FCC 2d at 786.) Although the Federal Communications Commission neither reviewed the merits of the UHF petition nor took any other action on the petition, plaintiff's proposed new CATV service was "automatically stayed" under Section 74.1105(a). On July 17, 1968, the plaintiff filed an "Opposition" to the UHF petition with the FCC. On August 7, 1968, the UHF stations filed a reply.

On October 23, 1968 plaintiff filed a "Petition for Temporary Relief" with the FCC requesting that the FCC permit plaintiff to commence service from already constructed facilities pending a hearing. The FCC denied this request in a Memorandum Opinion and Order adopted January 22, 1969, after the first hearing had taken place before this Court. It stated, "Bucks County has made no showing to justify the extraordinary relief requested."

The evidence adduced by plaintiff shows that by October the delay by the FCC in hearing the petition by the UHF stations was seriously threatening plaintiff's business. The plaintiff had over 800 applications for service and a number of them had made their deposits. Some customers were canceling their contracts and others were

complaining about plaintiff's failure to commence service. While plaintiff could have transmitted the Philadelphia stations, it was clearly the objected-to New York signals that make plaintiff's service attractive.

On November 15, 1968, the two objecting UHF stations filed their answer to plaintiff's petition for temporary relief. On November 25, 1968, plaintiff filed its reply with the Commission. On December 4, 1968, the UHF stations filed a Motion to Strike with the FCC, which was the last paper filed with the FCC by the parties on this matter now before this Court.

Then, on December 13, 1968, without having taken any action on the UHF stations' petitions, the FCC made public its Proposed Rule Making and Notice of Inquiry, Docket No. 18397. The proposal intended to "grandfather" the presently existing CATV systems which would otherwise be prohibited or restricted by the proposed rules, if they had commenced service, not in violation of existing rules, prior to December 20, 1968.

As part of the FCC's "Interim Procedures", under the proposed rules, paragraph 51 states:

> "Effective upon the issuance of the Notice, the Commission will halt the hearing process in all top 100 market proceedings (including those with a "footnote 69" issue) wherever it stands . . ."

Then paragraph 52 continues:

> "Commission action on pending and future Section 74.1109 petitions of this nature will be held in abeyance pending the outcome of this procedure."

Under the proposed rules a 35-mile zone would replace the Grade B contour and the "footnote 69" situation. Paragraph 49 states:

> "We are proposing further to codify in the rules the so-called 'footnote 69" suitation, i.e., where a central metropolitan area of one major market falls within the predicted contours of stations in another major market, so as to avoid the San Diego type of hearing and preserve the local character of such markets against the element of unfair competition. For this purpose it appears that the same 35 mile zone may be appropriate. . . ."

The statement continues:

> "The attached rules would prohibit a CATV system operating in a community located wholly within the 35 mile zone of a television station in a major market from carrying the signal of a television station in another major market unless the community of the system is also located wholly within the 35 mile zone of the station in the other market or unless the retransmission consent requirement is fulfilled."

Thus, it would be possible for a system like Bucks County to transmit the New York stations if it (1) obtained consent to retransmit from the New York stations, and (2) obtained permission from the FCC under paragraph 52 of the proposed rules which reads:

> "A CATV system may request relief from the proscription of Section 74.1105(c) in order to carry such signals in areas which would be permissible under the attached proposed rules. Such relief will be granted only to the extent that the request is entirely consistent with the proposed rules and with the public interest, as evidenced by the considerations in the particular case."

On December 19, 1968, in disregard of the stay imposed by Section 74.1105(c) and in order to obtain the benefit of the "grandfathering" provisions of the proposed new rules, the plaintiff commenced carriage of the four New York independent television stations on its Falls Township CATV system.[5]

The instant action was filed on December 24, 1968.

On January 8 and 9, 1969, the plaintiff tried to obtain permission from the four New York stations for the re-transmission of their signals into Falls Township. Only Channel 13, the educational, channel, agreed to give permission;[6] the others refused.

On January 13, 1969, hearing in this cause took place and was continued to January 28, 1969, for oral argument.

On January 22, 1969, the FCC adopted a Memorandum Opinion and Order which was released on January 23, 1969. The main purpose of the order was to grant plaintiff a hearing and to consolidate its case with that of twenty-four other stations in the *Delaware County Cable Television Company* case, Docket No. 18140, et al. The order states, inter alia, that the petitioners, the UHF stations, Channels 17 and 29, have the burden of proceeding and the burden of proof with respect to a determination of "whether carriage of predicted Grade B or better signals from New York City stations should be authorized."

The FCC stated that it took this action to make clear its position in light of the instant proceedings against it before this Court. It also said:

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5. There was testimony that the plaintiff consulted counsel who advised it that the "automatic stay" was unconstitutional as applied in plaintiff's case. N. T. 82-84 (January 13, 1969).

6. Channel 12, the educational channel from Wilmington, has objected to the carriage of the New York educational channel. (Whether a formal objection was filed with the FCC is not in the record) N. T. 70-71 (January 13, 1969).

"We stress the requirement that Bucks County must comply with our rules and policies and emphasize that we intend to take all appropriate steps to bring about such compliance. . . ."

It went on to say:

"We also point out that while the matter of the objections to Bucks County's carriage of New York signals is placed in hearing, the course of such hearing will, of course, be determined by our Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, released December 13, 1968 (see paragraph 51)."

The dissenting Commissioner Barlett stated:

"I concur in authorizing Bucks County to carry the 'local' signals of the Philadelphia and Wilmington stations.

I dissent to the order for a hearing on carriage of signals from New York City stations. The order is meaningless, in view of the Commission's action of December 12, 1968, Docket No. 18397, Notice of Proposed Rule Making and Notice of Inquiry, which froze all such hearings."

On January 28, 1969, oral argument was had before this Court which held the matter under advisement.

On February 12, 1969, plaintiff filed three separate Petitions for Review in the United States Court of Appeals for the Third Circuit.[7] In a letter from plaintiff's counsel to this Court, dated February 11, 1969, it is stated that:

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7. The petitions seek review of the automatic stay provision, proposed rulemaking and inquiry, and order adopted January 22, 1969. (Petitions for Review Nos. 17,743-17,745).

> "These petitions are filed out of an abundance of caution. . . . Since the FCC may argue that its Notice of Rule Making, issued on December 12, 1968, was some kind of reviewable 'order' . . ."

Paragraph 12 of the petitions stated:

> "The time for filing a petition for review in this Court could arguably expire on February 11, 1969. Although petitioner has always maintained and continues to maintain that the District Court has jurisdiction. . . ."

The Petitions for Review ask for the same relief as the motions before this Court.

Since January 6, 1969 by agreement of counsel, enforcement against petitioner of Rule 74.1105(c) and Section 502 of the Communications Act, which carries a $500 per day penalty, has been stayed. This agreement has continued while this Court had this case under advisement.

II. CONTENTIONS.

Plaintiff

(1) The plaintiff contends that it is entitled to a declaratory judgment[8] and that the so-called "automatic stay" provision of Section 74.1105(c) is unconstitutional and invalid as it has been applied to it.

(2) Plaintiff contends that under Section 74.1109(f) it was entitled to an "expeditious" and "prompt" decision from the FCC on the UHF stations' petitions for a waiver of the rule allowing Grade B contour retransmissions.

(3) Plaintiff contends that the FCC's delay and subsequent action taken towards adopting new rules on De-

8. 28 U. S. C. § 2201.

cember 12, 1968, deprived plaintiff of due process in relation to its investments in its CATV business.

(4) Plaintiff finally contends that because the "automatic stay" is unconstitutionally applied to it, it is entitled to an injunction against prosecution for violating said "stay" under 47 U. S. C. § 502.

(5) Plaintiff desires a hearing under the old rules since it believes the UHF stations objecting to its service will be unable to sustain their burden. Under the new rules plaintiff would not be able to carry the New York signals for practical reasons.

(6) The plaintiff states that as far as an injunction is concerned:

> "This doesn't prevent them [FCC] from stopping us tomorrow if they want to issue a rule to show cause why we shouldn't cease and desist. They can do that, but then they have to grant us a hearing." N. T. 18

Defendant

(1) The defendant's main contention is that this Court does not have jurisdiction of the matter.

(2) The defendant contends that under 47 U. S. C. § 402, jurisdiction to review FCC action is properly in the United States Court of Appeals.

(3) Defendant also contends that plaintiff is without "clean hands" because its notice of commencing new service was not given at the proper time.

(4) Defendant finally contends that the UHF stations' petitions were not ready to be heard by the Commission since papers were served as late as December 4, 1968, concerning plaintiff's petition for temporary relief and these

papers raised the issue of equality with Lower Bucks County Cablevision being able to receive New York signals for the first time.[9]

III. JURISDICTION.

This Court has jurisdiction over the subject matter of the instant complaint, sounding in equity, for a declaratory judgment and preliminary injunction.

The defendant has argued that plaintiff should have brought this action in the United States Court of Appeals under 47 U. S. C. § 402. This Court does not believe that the present posture of plaintiff's case before the FCC would enable it to bring an appeal in the Court of Appeals.

Section 402(b) of the Federal Communications Act concerns appeals from decisions and orders by the FCC on licenses, permits and cease and desist orders which are not involved here. While Section 402(a) concerns proceedings "to enjoin, set aside, annul or suspend any order by the Commission", the Court of Appeals is limited to review of only "final orders". Section 2342, 28 U. S. C. states:

> "The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47."

The action which the FCC has taken on this case cannot be considered to be a "final order" within the meaning of Section 2342 although there is a direct and ascertainable effect on plaintiff.

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9. Counsel for plaintiff stated that Bristol Township and Middletown Township served by Lower Bucks County Cablevision receive New York signals and both are farther away from New York than Falls Township served by plaintiff. N. T. 88.

On June 17, 1968, the "automatic stay" provision of Section 74.1105(c) went into effect upon the filing of the UHF station petition for waiver under Rule 74.1109. Such an occurrence involves no active participation of the FCC, seeks only to maintain the status quo, and anticipates further Commission action, in the form of a determination.

The FCC's "Notice of Proposed Rule Making and Notice of Inquiry" released December 13, 1968, while having a direct effect on plaintiff, was not a final order. Indeed, paragraphs 51 and 52, which called for a halt to hearings in situations such as plaintiff's are entitled "Interim Procedures". In *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956), the Court of Appeals' jurisdiction to hear the case was based upon the fact that the rulemaking process under the Communications Act of 1934 had been completed.

The FCC's "Memorandum Opinion and Order" adopted January 22, 1969, among other things, orders a hearing on the UHF stations' petitions for waiver. The order, however, cannot serve to deprive this Court of jurisdiction. (*Grant County Deposit Bank v. McCampbell, et al.*, 194 F. 2d 469, 472 (6th Cir. 1952).) In reality, this order is of no practical value to plaintiff since under paragraphs 51 and 52 of the Notice given December 13, 1968, hearings in cases like plaintiffs are stayed pending adoption of final rules which will, in turn, eliminate the necessity for hearings.

The plaintiff is in the analogous situation as that presented by *Elmo Division v. Dixon*, 348 F. 2d 342 (D. C. Cir., 1965). In that case the plaintiff sought to enjoin the Federal Trade Commission from bringing a new complaint where a former consent decree allegedly necessitated, in-

stead, a reopening of the case. In upholding the District Court's jurisdiction, the court stated:

> "We see no reason to bar District Court jurisdiction here, for relief in that court is appellant's only effective remedy. . . . The prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate. . . ." At 344

The court also states that "[s]tatutory provisions concerning review of agency action by the Court of Appeals do not in and of themselves, . . . preclude District Court jurisdiction. . . ." At 343

The Administrative Procedure Act provides for District Court jurisdiction in the kind of situation presented by this case. Section 702 provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The legal wrong suffered by plaintiff is the unconstitutional application of Section 74.1105(c) discussed further in IV below.

Section 703 of the Administrative Procedure Act provides:

> "The form of providing for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. . . ."

Plaintiff here seeks a declaratory judgment and preliminary injunction in the District Court.

Section 704 of the Administrative Procedure Act provides:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review."

In *Abbott Laboratories v. Gardner*, 387 U. S. 136 (1967) the Supreme Court upheld the jurisdiction of the District Court in a pre-enforcement suit for a declaratory judgment and injunction. The Commissioner of Food and Drugs had issued new regulations which plaintiff claimed exceeded his authority. In commenting on Section 704 the court stated:

> "The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administration actions, . . . and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation . . . the specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review. . . ." At 140-142.

Thus, the Administrative Procedure Act supplements the special statutory review procedures for final orders of the various agencies. Its review provisions utilize traditional equity actions for agency action not amounting to a final order, but which nonetheless directly affects plaintiff's rights. In interpreting "final agency action" found in Section 704, the Court states:

> "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way. Thus in *Columbia Broadcasting*

System v. United States, 316 U. S. 407, a suit under the Urgent Deficiencies Act, 38 Stat. 219, this Court held reviewable a regulation of the Federal Communications Commission setting forth certain proscribed contractual arrangements between chain broadcasters and local stations. . . ." At 149-150.

In *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir., 1961), the court upheld the District Court's jurisdiction in issuing an injunction against the National Labor Relations Board prohibiting the Board from delaying further its decision in the case. The court stated:

"The 'final agency action' made reviewable under § 10(c) [§ 704] of the Administrative Procedure Act need not necessarily be read synonymous with 'a final order of the Board granting or denying in whole or in part the relief sought. * * *' made reviewable under § 10(f) of the National Labor Relations Act. . . . When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, the delay is final agency action for which § 10 of the [A. P. A.] does provide an effective remedy." At 865-866.

The "automatic stay" provision found in Section 74.1105(c) has an impact on plaintiff which is sufficiently direct and immediate [10] so as to constitute final action. The delay by the FCC increases this impact. The stay is direct in that it is focused specifically at plaintiff on the basis of the petitions for waiver of rules filed by Channels 17 and 29. The result could not be more immediate in that the filing of their petitions stopped plaintiff from commencing service, notwithstanding the fact that the merits of the petitions were not even considered by the FCC.

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10. *Abbott Laboratories v. Gardner*, supra, at 152-154.

Plaintiff has exhausted all of its administrative remedies. In November, it applied for temporary relief pending the FCC decision but this was denied by the FCC on January 22, 1969. The fact that the FCC granted a hearing in plaintiff's case provides plaintiff with no relief since the hearing is stayed under the "Interim Procedures" of the Notice of Proposed Rule Making and Notice of Inquiry" (December 13, 1968).

There is no question that there is a case or controversy presented to this Court which is ripe for decision by way of a declaratory judgment. Besides the impact the provisions of Section 74.1105(c) have, there is the real threat of sanctions being imposed under 47 U. S. C. § 502 which can amount to $500 per day upon conviction. The FCC's order of January 22, 1969 states, in this connection, "We stress the requirement that Bucks County must comply with our rules and policies and emphasize that we intend to take all appropriate steps to bring about such compliance."

The defendants raised the claim that plaintiff had "unclean hands" and therefore could not obtain equity. The defendants claim that had plaintiff given notice in the proper manner called for by Section 74.1105(a),[11] they

11. "'No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to all facilities; in any event no CATV system shall commence such operations until thirty (30) days after ntoice has been given. . . ."

would not have risked their money since the automatic stay would have been activated a couple years earlier. The defendants claim that the plaintiff should have given notice "within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities." The Falls Township franchise, however, was obtain on December 21, 1965. The Second Report and Order, 2 FCC 2d 725, did not become effective until March 17, 1966. The plaintiff could not therefore comply with the rule requiring notice at least within sixty days of obtaining a franchise. The specific meaning of the notice provision could be the subject of reasonable and differing interpretations for a station in plaintiff's position. Plaintiff did give notice thirty days before it intended to commence service. This would seem to comply with Section 74.1105(a) which reads in part, "In any event, no CATV system shall commence such operations until thirty (30) days after notice has been given."

In any case, it is difficult to see how this oversight or misjudgment can bear at all upon the actions of the FCC with respect to a determination on the UHF stations' petitions for waiver.

Finally, this Court does not believe that plaintiff has an adequate remedy at law. Indeed, time is of the essence for plaintiff to resolve the proceedings before the FCC. On the facts before this Court there is no way of estimating the damage to plaintiff by the delay caused by the FCC.

IV. SUBSTANTIVE ISSUES.

This Court now turns to a discussion of the merits of plaintiff's contention that it was illegally deprived of a "prompt" and "expeditious" determination by the FCC on the UHF stations' petitions for waiver of rules. Unless the FCC failed to follow its own rules or acted in an arbitrary and capricious manner, this Court would be unable to grant

plaintiff the relief it seeks. However, having carefully considered the evidence presented and subsequent oral argument, this Court has decided that the FCC failed to follow its own rules and delayed its determination in such a way as to deprive the plaintiff of due process of law. Accordingly, the relief requested—a declaratory judgment and preliminary injunction in plaintiff's favor—will be granted. Being both mindful of the Federal Communications Commission's regulatory responsibilities in this area, see *United States v. Southwestern Cable Co.*, 392 U. S. 157 (1968), and the possible adverse impact this decision may have on the overall policy of the FCC in the growing area of CATV (see "Notice of Proposed Rule Making and Notice of Inquiry", December 12, 1968) this Court cannot ignore the injustice in an individual case.

The evidence set out on the record by plaintiff went largely uncontradicted by counsel for the FCC.[12] The defendants, on the other hand, rely heavily upon their motion to dismiss for lack of jurisdiction. The defendants made very little effort to defend the specific course of action taken with respect to the individual plaintiff in proceedings before the FCC. Thus, once the jurisdictional questions were resolved, it was really only up to this Court to decide whether what happened entitled plaintiff to relief.

Plaintiff's CATV system was due to commence operations in July, but because two UHF stations, Channels 17 and 29 of Philadelphia, filed petitions for waiver of rules under Section 74.1109, plaintiff's service was "automatically stayed" under 74.1105(c) on June 17, 1968. Section 74.1105 (c) provides in part, "new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition."

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12. The defendants did not offer any evidence for the record. N. T. 89.

Section 74.1109(f) provides in part:

> "Where a petition involves new service to subscribers . . . *the Commission will expedite its consideration and promptly issue a ruling* either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures." (Emphasis supplied.)

The Second Report and Order, 2 FCC 2d 725, 786 (1966), states that, "[i]n view of the nature of the problem, the Commission will give expedited treatment to petitions in this area." This is the crux of plaintiff's complaint.

The last paper concerning the petition for waiver of the rule was filed on August 7, 1968 by the plaintiff. At this point the case was ready for consideration by the Commission. The FCC, however, took no action on the petitions for waiver until January 22, 1969, during the pendency of this cause, when it ordered a hearing.

On October 23, 1968, the plaintiff filed for temporary relief with the FCC. The UHF stations filed a motion to strike with the FCC on December 4, 1968, which was the last paper filed in the matter of temporary relief. The FCC took no action on this application until January 22, 1969, during the pendency of this action, when it denied temporary relief.

The defendants attempted to argue that the case was not ready for determination by the FCC because the last paper filed was done in December 1968. This, however, belies the fact that the FCC failed to take "expeditious" action on the petitions for waiver which were ready for determination in August 1968. The fact that plaintiff filed for temporary relief when it was losing its business, due to the uncertainty created by the FCC's delay in disposing of the petitions for waiver, should not be held against it.

The fact that any station which has been given notice of the new service can halt a new station's operations simply

by filing for a waiver of the rules under Section 74.1109 necessitates a very close look into the procedures adopted to resolve such disputes. In addition, neither the merits of the UHF petitions nor the pleading were considered before the "automatic stay" of Section 74.1105(c) went into effect. Clearly, an expeditious and prompt determination would appear to be the minimum required. Where there are factual problems, a hearing such as has been ordered by the FCC, would seem to be necessary.

There is little doubt in the mind of this Court that the FCC was anticipating its proposed changes in the rules when it refused to take up the petitions of the two UHF stations for a waiver of the rules. This Court does not believe that the FCC should be allowed to increase the effectiveness of an as-then unannounced policy by disregarding the currently existing policy of dealing with such matters in an expeditious manner. The change in FCC practices embodied in the proposed new rules and notice of inquiry effective December 20, 1968, should not be allowed to cut plaintiff off completely from rights which until that time had only been temporarily delayed through the stay.

The defendants rely upon *United States v. Southwestern Cable Co.*, 392 U. S. 157 (1968) where the Supreme Court upheld the FCC's order halting respondent's (Southwestern Cable) transmission of signals from Los Angeles into the San Diego area. The opposition to this transmission petitioned for relief from the FCC under Section 74.1107 and Section 74.1109. The respondents contended that the FCC could not issue its prohibitory order without first providing them with a hearing. They contend that the order was really a cease and desist order. The Supreme Court, however, held that:

> "The Commissioners order *limiting further expansion* of respondent's service *pending appropriate hearings*

did not exceed or abuse its authority under the Communications Act. . . .". (Emphasis supplied.) At 181.

Important to the *Southwestern Cable* case then is the fact that appropriate hearings were to be held. In addition, *Southwestern Cable* did not involve an "automatic stay" as in the instant case. The Supreme Court states:

> "*After consideration of the petition and of various responsive pleadings,* the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints." (Emphasis supplied.) At 160.

Finally, the respondent in *Southwestern Cable,* unlike the instant plaintiff, had the burden under Section 74.1109(a) of proving "that such extension would be consistent with the public interest." In the instant case the two UHF stations have the burden on "whether carriage of predicted Grade B or better signals from New York City stations should be authorized." (Memorandum Opinion and Order, Docket No. 18432, adopted FCC January 22, 1969. See also Section 74.1109(c).) The Second Report and Order, 2 FCC 2d 725, 786 (1966), states in this connection, "With possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue." The UHF stations, in such situations, apparently bear a considerable burden in seeking a waiver of the rules. *Cedar Rapid Television Co. v. FCC,* 387 F. 2d 228 (D. C. Cir. 1967).

Clearly, there may be good reasons for *denying* hearings to persons who *object* to new service and seek a *waiver* of the rules. The court in *Cedar Rapids* states:

> "If hearings were required on the sort of 'bare-bone' petition filed here, then hearings would almost always be required." At 232.

In *Titusville Cable TV, Inc. v. United States and FCC*, 404 F. 2d 1187 (3rd Cir. 1968) the court upheld the denial without evidentiary hearings of petitions for waiver of the non-duplication provisions of 47 C. F. R. 74.1103(f). Agreeing with the need for flexible procedures found in Section 74.1109, the court states:

> "When general rules are enacted in a valid rule-making proceeding they may be applied by the Commission without individual adjudicatory hearings unless a party shows reasons why the public interest would be served by an individualized waiver of the rules. . . ." At 1192.

It is, indeed, unfair to expect that the person *seeking a waiver of the rules* can benefit by the FCC's delay and gain all it asks, while the party without the burden loses all without having received any determination at all. Such was the situation confronting this Court.

While the FCC can make "such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions", 47 U. S. C. § 154(j), it is difficult to see how the continued delay under the stay provision conforms to this. In fact, about all this stay did was to preserve the status quo until the FCC could make effective new procedures which would effectively eliminate the need for the FCC to take any further action in the case. Such does not appear to be a valid use of 47 U. S. C. § 154(i).

In *Farmer v. United Electrical, Radio and Machine Workers*, 211 F. 2d 36 (D. C. Cir. 1953), cert. denied 347 U. S. 1019 (1954), the court upheld an injunction and

declaratory judgment against the NLRB's attempt to enforce verification of noncommunist affidavits submitted by union officials without a prior hearing. In holding that the NLRB had no authority to require verification and that the District Court had jurisdiction, the court stated:

> "These instructions [prohibiting unions from filing complaints] have and, *but for the injunction issued below, would have continued to deprive the unions of crucial benefits under the Act and this without any sort of prior hearing.* In these circumstances, *it can hardly be said* that the action assailed is not ripe for review, *or that the unions should be required to exhaust a dubious opportunity for a hearing offered to them after the ax had fallen*, or that there is an adequate remedy at law for the injuries resulting from the Board's unlawful action. . . ." [Emphasis supplied.] At 40.

In *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961) the court upheld a District Court's injunction against further hearings that justified fears of lengthy and costly hearings. In *Deering* several years were involved. In the instant case the delay was a matter of at least four months.[13] The interests involved in the instant

13. "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitution and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; . . ." Section 706, Administrative Procedure Act.

case, however, concerned the very existence of a business enterprise and the statute recognized that where new service was involved a speedy decision was necessary, ". . . the Commission will expedite its consideration."

ORDER.

ACCORDINGLY, this 28th day of March, 1969, IT IS ORDERED that the "automatic stay" provision of Section 74.1105(c) of the FCC rules pertaining to CATV system be declared unconstitutional as it was applied to Bucks County Cable TV, Inc. Further, this Court does grant a preliminary injunction[14] against the prosecution of the plaintiff under 47 U. S. C. § 502 for commencing carriage of New York stations on and after December 19, 1968.

RALPH C. BODY, *J.*

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14. See *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 98-99 (1949).

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 68-2773

BUCKS COUNTY CABLE TV, INC.

v.

THE UNITED STATES OF AMERICA
and
THE FEDERAL COMMUNICATIONS COMMISSION
and
ROBERT T. BARTLEY, KENNETH A. COX, ROSEL H. HYDE, NICHOLAS JOHNSON, H. REX LEE, ROBERT E. LEE, JAMES J. WADSWORTH

ORDER.

The defendants' Motion for Rehearing, pursuant to Rule 59, F. R. C. P., and Motion to Vacate Injunction, are REFUSED.

[1] The motions and supporting affidavits do not raise any new and substantial facts for this Court's consideration.

[2] The motions incorrectly state that this Court's decision held Section 74.1105(c) unconstitutional per se. It is obviously the manner in which this section was applied that this Court found objectionable.

[3] The appealability of the complained of action to the Court of Appeals under 47 U. S. C. 402(a) was thoroughly argued before this Court and dealt with in this Court's written Opinion and Order, March 28, 1969.

[4] It is very questionable that this decision will directly affect the outcome in very many other cases.

[5] The defendants had adequate opportunity to present evidence at the earlier hearing but chose to rely on its motion to dismiss. In any event, having read and considered the affidavits, this Court believes them to be repetitive and if anything favorable to the plaintiff's position.

RALPH C. BODY, *J.*

DATED: April 17, 1969

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 17743
No. 17744
No. 17745

BUCKS COUNTY CABLE TV, INC.,

Petitioner

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents

U. S. COMMUNICATION CORP.,

Intervenor

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

No. 18037

BUCKS COUNTY CABLE TV, INC.

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION AND ROBERT T. BARTLEY, KENNETH A. COX, ROSEL H. HYDE, NICHOLAS JOHNSON, H. REX LEE, ROBERT E. LEE, JAMES J. WADSWORTH,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 3, 1970

Before HASTIE, *Chief Judge*, MARIS and ADAMS, *Circuit Judges*

OPINION OF THE COURT.

(Filed June 4, 1970)

ADAMS, *Circuit Judge*

This case presents the question whether the regulatory arrangement promulgated by the Federal Communications Commission (FCC) to control the growth of community antenna television (CATV), has been applied to petitioners-appellee in a manner depriving it of due process. Principally at issue is the application of the FCC's automatic stay provision to the proposed CATV operation of Bucks County Cable TV, Inc. (Bucks).

A community antenna or cable television system picks television signals off the air with a specialized receiving antenna, amplifies them, and transmits them through coaxial cable to the television receiving set of home viewers who pay for the service.

The main cable television growth has been in areas of limited television service where off-the-air signals are available from only one or two stations. In these areas, CATV's main attraction has been its ability to offer subscribers a full complement of network programming. More recently CATV systems have spread into the nation's larger cities which already receive the three major networks. Aside from improved reception, CATV systems are able to supply subscribers in the larger cities with an even greater selection of programs by importing signals of non-network stations from other communities.

On April 22, 1965, the FCC released a *Notice of Inquiry and Notice of Proposed Rule Making* 1 F. C. C. 2d 453,

proposing to regulate all CATV operations. In the notice, the FCC expressed particular concern with cable television's recent movement into the nation's major television markets. The FCC and Congress had previously decided that the development of UHF broadcast stations was essential for the achievement of adequate local interest programming within the major markets. The FCC was primarily concerned in the notice with the effect that the importation of signals from outside communities would have on the ability of UHF stations to develop as effective outlets for local self expression.

In 1965, subsequent to the release of the Notice of Proposed Rule Making, Bucks received municipal franchises to establish and operate CATV systems in five Bucks County, Pennsylvania communities. Bucks planned to carry to its subscribers the signals of all the Philadelphia stations and to import the signals of four New York City non-network stations. Bucks considered the carriage of New York signals necessary to attract a sufficient number of subscribers to make its operation profitable.

On March 8, 1966, in its Second Report and Order, 2 F. C. C. 2d 725, the FCC announced regulations for cable television operations, 42 C. F. R. 74.1100-74.1109. The Commission found that the importation of signals from other communities into the major markets posed a serious threat to the development of UHF broadcasting within the major markets. CATV systems were, therefore, restricted from importing into any of the nation's 100 largest television markets the signals of outside television stations at least where the signals of those station would be extended beyond their Grade B contours. 47 C. F. R. 74.1107(a).

In addition, the FCC adopted a procedure whereby it could resolve objections to any proposed CATV operation

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1. The Grade B contour of a television station is the imaginary line within which a good picture may be expected 90% of the time at the best 50% of the locations. See 47 C. F. R. § 73.683.

before it commenced service. It provided that a CATV system was required to give notice to all television broadcast stations within whose Grade B contours it planned to operate, at least thirty days prior to commencing new service. 47 C. F. R. 74.1105(a). If within thirty days after such notice a station objected to an aspect of the proposed service, the challenged portion of that service would be stayed pending consideration by the FCC. 47 C. F. R. 74.1105(c). The rules also provide that in such a case "the Commission will expedite its consideration and promptly issue a ruling . . .". 47 C. F. R. 74.1109(f).

The five communities in which Bucks was franchised to establish CATV systems are all part of the Philadelphia television market, being within the prime reception area or Grade A contour of the Philadelphia broadcast stations. Of these five communities, Falls Township, less than ten miles from Philadelphia is also within the fringes of the Grade B contours of the New York City independent stations. Bucks decided to construct a CATV system only in Falls Township. It contends that its decision was based on the belief that the carriage of New York Grade B signals into Falls Township was authorized by the existing rules.

In September, 1966, some six months after the release of the Second Report and Order, Bucks began construction in Falls Township. Over approximately the next two years, it invested $267,000 in out-of-pocket expenditures and committed itself to $150,000 of long term expenditures. On May 17, 1968, in compliance with the rules, Bucks gave notice to area stations of its intention to commence service. Two Philadelphia UHF stations filed timely petitions objecting to that part of Bucks' proposed service which contemplated carriage of New York City signals. The objections put into effect the automatic stay provision of section 74.1105(c) which prohibited Bucks from carrying the challenged signals pending consideration by the FCC. The parties filed extensive pleadings and on August 7, 1968,

the matter became ripe for consideration. On October 23, 1968, with no action having been taken by the FCC, Bucks filed a petition for temporary relief requesting permission to commence carriage of the New York signals pending the FCC's determination of the UHF stations' objections.

On December 13, 1968, the FCC released a Notice of Proposed Rule Making and Notice of Inquiry, 15 F. C. C. 2d 417, in which it proposed revisions of its CATV rules. The new rules were intended "to substitute a definitive policy for the evidentiary hearing procedure" adopted in the Second Report and Order. The FCC dealt directly with the situation in which the Grade B contour of a station in one market overlaps a portion of another market. Under the new standards a CATV system would be prohibited from importing signals from one major market into a community within 35 miles of the center of another major market without the consent of the originating broadcast station. Since Falls Township is less than ten miles from Philadelphia, and the New York stations have thus far refused retransmission consent, the new rules would effectively bar Bucks from importing the New York City signals.

Pending final action on the proposed rule changes, the FCC suspended all action on CATV systems awaiting its approval and announced that CATV operations would be authorized to commence service only if "entirely consistent with the proposed rules". 15 F. C. C. 2d 417 at para. 51 and 52. Only CATV systems lawfully in operation prior to December 20, 1968, the date of publication of the Notice in the Federal Register, would not be required to meet the standards of the new rules.

Hoping to avoid the effect of the proposed rules, Bucks began operation, including the carriage of New York signals, on December 19, 1968. Since the FCC had not ruled on the objections of the UHF stations, Bucks' action was in clear violation of the stay provision of section 74.1105(c).

On December 24, 1968, Bucks brought an action for declaratory judgment in the District Court for the Eastern District of Pennsylvania, alleging that section 74.1105(c) was unconstitutional, or that, even if reasonable on its face, such section had been improperly and prejudicially applied to Bucks.

During the pendency of the District Court action, the FCC for the first time on January 22, 1969, issued an order regarding Bucks' case. The Commission denied Bucks' petition for temporary relief and consolidated the UHF petitions for hearing with other pending CATV proposals to serve Philadelphia. However, the FCC expressly noted the applicability of the December 13th Notice under which all CATV hearings were being held in abeyance during the pendency of the rulemaking proceedings.

On March 28, 1969, the District Court ruled in Bucks' favor declaring that section 74.1105(c) had been unconstitutionally applied to Bucks. The Court also granted a preliminary injunction against prosecution of Bucks for commencing carriage of the New York signals.

Initially, the FCC contends that the District Court lacked jurisdiction over the subject matter of Bucks' claim. It bases this contention upon 28 U. S. C. § 2342 which provides courts of appeals with exclusive jurisdiction to review "all final orders" of the FCC. The District Court found that, although Bucks was aggrieved by "final agency action", see 5 U. S. C. § 704, there was no "final order" of the FCC which would allow Bucks to seek direct review in a court of appeals. However, while the action was still pending before the District Court, Bucks, in order to preserve its rights on the merits, filed three petitions for review directly in this court. These petitions duplicate the relief requested in the District Court. In addition no factual issues are presented for resolution. Thus, whether on appeal from the District Court or on direct review from a "final order" of the FCC,

this Court has jurisdiction in the present case. We, therefore, find it unnecessary to determine whether the District Court properly asserted jufisdiction.

In order to avoid the effect of the proposed rules, Bucks directs its attack at section 74.1105(c) of the FCC regulations by which its operation was stayed upon the petition of two objecting UHF stations. It attempts to analogize the stay provision of that regulation to a formal judicial cease and desist order. Bucks argues that its proposed carriage of New York Grade B signals to Falls Township was permitted by the then existing FCC rules and that the automatic stay provision, allowing broadcasters to "enjoin" its operation upon the mere filing of objections without any FCC consideration, is unconstitutional. Bucks further contends that, in any case, the FCC's long delay in considering the UHF stations' objections, which were preventing its proper operation, was unconstitutional.

Section 74.1105(c) cannot be interpreted as a mere indiscriminate delegation of injunctive power to private parties. That section is a vital part of the FCC's total regulatory concept, adopted in a comprehensive rule-making proceeding. It is important to recognize in this regard that cable television is a dynamic and growing industry presenting complex problems for FCC regulation. Additionally, the Commission has repeatedly recognized the impracticability of withdrawing CATV service from subscribers once it has become established. Second Report, supra, 2 F. C. C. 2d at 782. The FCC determined that a procedure was necessary by which it could review proposed CATV service before that service became entrenched. Rather than prohibit all CATV operations pending consideration, the FCC allowed those operations not involving the extension of signals beyond their Grade B contours to proceed unmolested unless there was an objection. But where im-

portant issues of impact on broadcast services were raised, by objection or otherwise, the FCC required that such issues be considered before the CATV system commenced operations.

However, Bucks contends that the automatic stay, even if valid when first imposed, could not be continued in effect without prompt agency consideration, and became invalid and without force sometime before December 19, 1968, because of the FCC's delay in considering the objections of the UHF stations. We must re-emphasize in this regard that section 74.1105(c) is not a judicial cease and desist order, but is rather an integral part of the FCC's regulatory scheme designed to provide for prior agency consideration of important problems posed by CATV service. In considering these complex public interest problems, the FCC was not bound by the same strict limitation which binds courts in the consideration of temporary restraining orders.[2] The limitations on temporary restraining orders reflect the fact that they are normally sought in situations where one has already begun operation after substantial investment under a prima facie right. In contrast, the FCC's automatic stay is not applied where legal operation has commenced and does not prevent the exercise of any presumptive right. It is designed to facilitate a prior determination whether a proposed operation should be sanctioned in the public interest where objectors raise that question. Furthermore, the regulations contemplate that the stay will be applied before substantial investments have been made. Although Bucks did invest money before the stay went into effect here, as noted below Bucks could easily have avoided this result by disclosing its intentions

2. Rule 65(b) of the Federal Rules of Civil Procedure provides that a temporary restraining order issued by a district court may only remain in effect for ten days.

at an earlier date before any investment was made. However, while the automatic stay is not restricted to the same extent as judicial restraining orders, the FCC was constrained by its own rules to "expedite its consideration and promptly issue a ruling". 47 C. F. R. 74.1109(f).

The objections of the UHF stations became ready for consideration on August 7, 1968. The FCC issued a ruling on January 22, 1969, in which it decided that the stay was proper and should be continued. This five month period before the FCC acted with regard to Bucks' individual system does not appear unreasonable in view of the large number of similar matters then pending before the FCC for consideration.[3] Furthermore, over a month before the January decision, in the December 13th Notice, the FCC specifically provided that CATV systems like Bucks, whose commencement of service had been stayed by section 74.1105(c), were continued stayed "pending the outcome of this proceeding". 15 F.C.C. 2d 417 at para. 52.

In addition, the FCC had previously developed a city-by-city approach to CATV proposals and had repeatedly refused permission to CATV systems to import even Grade B signals from other communities into a major market

3. The Commission's Annual Report for 1968 contains the following overall statistics with respect to CATV proceedings before the agency during the 1968 fiscal year. "A total 362 requests for authority to bring distant TV signals into the top-100 markets have been filed, 80 during the past fiscal year. One hundred fifty-four have been disposed of and a backlog of 208 remains. Under Section 74.1109 (requests for special relief or waiver of the carriage and program exclusivity rules), 325 petitions were filed and 103 acted upon during the fiscal year. Under Section 76.1105 (notification prior to commencement of service), 282 notifications were filed. Five hundred eight microway applications to serve CATV's were filed: 309 in the Common Carrier Service, 48 in Safety and Special Radio Services, and 62 in the Community Antenna Relay Service (CARS). A total of 838 applications was acted upon during the fiscal year." *34th Annual Report of the Federal Communications Commission* (1968).

pending a market-wide hearing.[4] On March 13, 1968, two months before Bucks gave notice of its intended service, the FCC had considered similar CATV proposals to serve Philadelphia and had established a firm policy for CATV activity in that market. Carriage of New York City signals into any community located within forty miles of Philadelphia was stayed, and all such proposals were consolidated for a marketwide hearing. Delaware County Cable Television Co., 12 F. C. C. 2d 529, 534 (1968). Thus, Bucks was aware that, consistent with FCC policy for the Philadelphia market, its challenged carriage of New York signals would be further stayed pending an area-wide hearing.

Even assuming that the FCC's delay in actually issuing this expected order was in technical violation of its rules, that delay itself does not entitle Bucks to operate. The proper judicial response to the situation in which an agency has delayed prompt consideration would be to order that such consideration be immediately given. However, in both the December 13th Notice and in the January 22nd Order, the FCC gave consideration, even if not expedited, to the propriety of continuing Bucks under stay. In waiting until those dates to take the expected action, the FCC did not provide Bucks with a legal excuse for commencing service in clear violation of announced FCC policy.

In support of its claimed relief, Bucks creates the impression that the carriage of New York Grade B signals into Falls Township was authorized by FCC policy announced in the Second Report and Order, that it constructed its CATV system in reliance on that policy, and was caught, due to the FCC's delay, under changed standards which prevented

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4. *See, e.g.*, Vision Cable Co., 10 F. C. C. 2d 954 (1967), designated, 14 F. C. C. 2d 654 (1968), Buckeye Cablevision, Inc., 10 F. C. C. 2d 745 (1967), National Cable Co., Inc., 10 F. C. C. 2d 613 (1967), Fetzer Cable Vision, 6 F. C. C. 2d 845 (1967), Midwest Television, Inc., 4 F. C. C. 2d 612 (1966).

its operation without even the opportunity for a hearing to which it was entitled under the prior rules. We cannot agree.

The Second Report and Order rather than authorizing the carriage of New York signals into Falls Township, raised serious doubts whether such carriage would be permitted.

The primary concern of the Second Report and Order was with the effect that carriage of signals from the major market into another would have on the development of local-interest UHF broadcasting in the latter market. The FCC found that the imported signals would compete directly and unfairly with local UHF stations for the already limited audience interested in non-network programming. Repeated reference was made in the Report to the Philadelphia television market where the FCC feared that importation of the New York City signals might completely destroy the UHF stations with a resulting loss of local-service programming. 2 F. C. C. 2d at 772-75.

The rules adopted in the Second Report and Order to protect UHF broadcasting cannot be understood as restricting only carriage of signals beyond their Grade B contours and, thereby, authorizing all other CATV service. The FCC not only specifically restricted carriage of signals beyond their Grade B contours, but also adopted a procedure whereby it could review other proposed CATV service. Indeed, the FCC specifically noted in this regard that proposals, such as Bucks', to carry Grade B signals from one major market into another, could have the same feared effect on UHF broadcasting. Second Report, supra, 2 F. C. C. 2d at 786 n. 69.

On July 20, 1966, some two months before Bucks began construction in Falls Township, the FCC released its first decision under the major market policy of the Second Re-

port and Order. In Midwest Television, Inc., supra 4 F. C. C. 2d at 621-22, the FCC stayed the importation of Los Angeles signals into San Diego even though the CATV systems in San Diego were within the Grade B contours of the Los Angeles stations. The FCC made emphatically clear in *Midwest* that it would be a misconception of FCC policy for a CATV system to believe that the Second Report and Order authorized the carriage of even Grade B signals from one major market into another.[5]

5. The Commission stated:
"Some of the respondents have alleged that sin
operate within the predicted or measured grade
the Los Angeles stations carried on their systems,
of * * * the second report * * * which relate gene
sion of beyond grade B signals, do not apply to then
that they may, therefore, continue to expand withou
This contention, however, misconceives the main thres
major market policy. The Commission's primary conce
respect to CATV operations in the major markets impo
distant television signals was whether such operation may be
such nature or significance as to have an adverse economic
impact upon the establishment or maintenance of UHF stations
or to require these stations to face substantial competition of a
patently unfair nature" (second report, par. 139). We defined
distant signals as those signals extended or received beyond the
grade B contours of those stations. While this standard will
generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means
a fixed and immutable standard to which we will blindly adhere.
As we pointed out in the second report, CATV activity which
does not involve extension of a signal beyond the grade B
contour may continue; * * * with possibly only the rarest exception * * *" (second report, par. 151). This exception involves
a situation where, for instance, two major markets fall within
one another's grade B contours, and the importation of signals
of the stations in one market into the other would equalize the
quality of the distant signals, possibly change the viewing
habits of the latter community, and affect the development of
independent UHF stations there. [Second Report, 2 F. C. C.
2d at 786 n. 69]. Assuming, arguendo, as respondents contend,
that their systems are within the predicted or measured grade B
contours of the Los Angeles stations, this is exactly the situation
presented here."

Thus, Bucks' decision to invest funds for the construction of a CATV system in Falls Township was made with full awareness of the substantial risk that if objected to, its proposed carriage of New York City signals would not be permitted. It deserves mention in this regard that Bucks could have avoided risking any funds by simply giving notice of its proposed service prior to beginning construction. If no objection was lodged within thirty days, it could have proceeded unmolested. However, Bucks chose to wait to give notice until its construction was almost complete in May, 1968. During this period of approximately two years the FCC repeatedly stayed CATV systems proposing to carry Grade B signals from one major market into another. Indeed, on March 13, 1968, the FCC stayed other CATV proposals to carry New York City Grade B signals into the Philadelphia market, stating that "we can find little reason for permitting carriage of some New York signals but not permitting carriage of others merely on the happenstance of the location of the predicted contour." Delaware County Cable Television Co., supra, 12 F. C. C. 2d at 534 (1968).

Equally without merit is Buck's contention that the Commission's delay deprived Bucks of a hearing under the prior rules. Bucks possessed no vested right in such a hearing.

The Second Report and Order is most clearly understood as a temporary measure designed to gain experience for further action in the complex area of cable television regulation. The hearing process was intended, not to establish vested standards for the resolution of private disputes, but primarily as a tool by which the Commission could better inform itself of the impact of CATV operations within the major markets. The FCC made quite clear that "as we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or

terminate the procedure, as the experience indicates". Second Report, supra, 2 F. C. C. 2d at 786.

In Midwest Television, Inc., 13 F. C. C. 2d 478, 505 (1968), the only major market hearing completed under the procedures of the Second Report, the FCC recognized the inadequacy of such individual hearings and the need "for the formulation of overall policy" to govern CATV operations. Accordingly, the December 13th Notice was designed to achieve the "far-ranging, overall view [that] is necessary if the Commission is to come to grips with this dynamic field * * *" Notice of Proposed Rule Making, supra, 15 F. C. C. 2d 417. The proposed rules deal directly and comprehensively with the situation in which the Grade B contours of two major markets overlap—the exact problem presented by Bucks' intended operation. The FCC is presently receiving comments and considering suggestions with regard to its recommended standards. There is no basis for the contention that the FCC should be bound to afford Bucks an individual hearing rather than take a comprehensive approach toward the issue presented as it has found necessary. See, Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 HARVARD L. REV. 863 (1962).

It is important to note that the delay of which Bucks complains did not prove prejudicial because of the mere passage of time or the occurrence of some independent circumstance. The circumstance which Bucks seeks to avoid in the present case is an FCC proposal developed after careful consideration of the issues and determined to be in the public interest. The FCC determined that CATV proposals such as Bucks', which intended to import distant signals into a major market, would compete unfairly with the local UHF stations. The UHF station is forced to pay for its programming while the CATV system, without any payment, brings the same programming into the community by simply im-

porting distant signals. In order to eliminate the unfair competitive impact, the FCC required a CATV system intending to import distant signals, to bargain with the originating station for retransmission consent. Bucks has shown no equity in the prior rules which would allow it to avoid this public interest requirement.

The judgment of the Court below will be reversed and the petitions for review of the order of the Federal Communications Commission will be denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17743
No. 17744
No. 17745

BUCKS COUNTY CABLE TV, INC.,
Petitioner

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents

U. S. COMMUNICATION CORP.,
Intervenor

Present: HASTIE, *Chief Judge* and MARIS and ADAMS, *Circuit Judges.*

It is ORDERED that the petitions for review in the above-entitled cases be, and they are hereby denied. Costs taxed in favor of respondents and intervenor.

ATTEST:

THOMAS F. QUINN,
Clerk.

Dated: June 4, 1970.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18037

BUCKS COUNTY CABLE TV, INC.

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION AND ROBERT T. BARTLEY, KENNETH A. COX, ROSEL H. HYDE, NICHOLAS JOHNSON, H. REX LEE, ROBERT E. LEE, JAMES J. WADSWORTH,
Appellants

(D. C. Civil Action No. 68-2773)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge* and MARIS and ADAMS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 28, 1969, and the order of the said District Court, filed April 18, 1969, be and the same are hereby reversed with costs taxed in favor of appellants.

ATTEST:

THOMAS F. QUINN,
Clerk.

June 4, 1970.